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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 157

OCTOBER TERM, 195

JAMES F. KELEHER, *Appellant*

v.

LA SALLE COLLEGE

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on January 15, 1959, rehearing denied February 11, 1959, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 394 Pa. 545. The opinion of the Court of Common Pleas No. 2 in the instant case is unreported. A copy of said opinion is printed in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 15, 1959. A re-hearing was denied on February 11, 1959. Notice of appeal was filed in that court on May 7, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C., Section 1257 (2).

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

1. Has the appellant been afforded due process of law under the 14th amendment of the Constitution of the United States when he is not permitted to testify as to the terms of the oral contract on which his action is founded?

2. Has the appellant's rights under the obligation of contract clause, Article 1, Sec. 10, of the Constitution of the United States been impaired when not permitted to testify as to the terms thereof?

STATEMENT OF THE CASE

1. The Facts

On September 18, 1953, the appellant instituted an action in assumpsit against LaSalle College of Philadelphia, Pennsylvania. Appellant, who had been employed by the College as a teacher in philosophy and religion from 1948 to 1953, alleged a breach of an oral contract by the College. The Answer filed by the appellee denied the oral contract, it being averred that appellant's employment was governed by written contracts executed in June of 1951 and June of 1952.

Appellant was prepared to testify that an oral contract was made in the early summer of 1951 between him and Brother Paul, at that time President of LaSalle College, under the terms of which appellant was provided with an increase in salary, extra duty as head of Department and a right to continuing employment.

For the scholastic year 1952-53 President Brother Paul was replaced by Brother Stanislaus. In March of 1953 President Brother Stanislaus advised appellant in writing that his employment as a teacher would not be extended beyond that scholastic year, for reasons other than appellant's failure to perform competently his teaching services. Appellant replied in writing, alleging his right to continued employment by virtue of the aforementioned oral contract. President Brother Stanislaus answered appellant's communication in a writing dated March 11, 1953, stating that "inasmuch as this tenure was extended to you under the authority of the President, it can, likewise, be revoked under the same authority." He thereupon terminated the contract of employment.

After the appellant took the stand at the trial, but before he was given an opportunity to testify, appellee introduced in evidence the written contract of the parties dated June 15, 1952, covering the academic year 1952-53. Appellant was asked to and did identify his signature to said contract. Thereupon the appellee moved for a non suit or a directed verdict on the pleadings.

Common Pleas Court Judge John Morgan Davis, before whom the trial was held, thereupon granted the non suit on a finding of law that the entire contract of employment was embodied in the 1952 written contract and that evidence of the 1951 oral agreement was inadmissible. The Court did allow appellant to introduce the four letters of correspondence between appellant and President Brother Stanislaus.

After motion to take off the non suit was dismissed and judgment entered for the appellee, appellant on May 21,

1958, did file an appeal to the Supreme Court of Pennsylvania.

On August 15, 1958, Common Pleas Court Judge John Morgan Davis filed his Opinion and issued an order correcting the docket entry of November 7, 1957, which showed that a non suit had been entered and in its place to enter "Judgment for defendant on the Pleadings" under the same date.

The Supreme Court of Pennsylvania stated that the procedure followed in this case, both with regard to the non suit and the entry of judgment on the pleadings was improper and ordinarily the record would be remanded for appropriate correction. Relying on the Act of May 20, 1891, P. L. 101, sec. 2, 12 P. S. 1164, the Supreme Court stated it had the power to enter such judgment as they deem just a .d proper without remanding the record to the court below for amendment or correction. Judgment was directed to be entered for the appellee.

2. How the Federal Questions Are Presented

There can be no dispute that the procedural questions were properly raised in this case and were favorably passed upon by the Supreme Court of Pennsylvania.

In determining to take original jurisdiction rather than return the case to the lower court, the Supreme Court relied on the following statute:

> "The supreme court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from, and to enter such judgment, order or decree in the case as the supreme court may deem proper and just, without returning the record for amendment or modification to the court below, and may order a verdict and judgment to be set aside and a new trial had." Act of May 20, 1891, P. L. 101 Sec. 2, 12 P. S. 1164.

The powers granted to the Supreme Court of Pennsylvania are sufficiently broad to cover the case before them. However, even these powers presuppose that no action by that court could be legal if it denies to any of the parties those rights guaranteed by the Constitution of the United States. Although not mentioned in that statute, the Legislature cannot by the enactment of a statute which grants specific powers to the Court, violate the rights of due process of law. That right is inherent in every statute whether specifically worded or omitted.

The Supreme Court stated that the lower court acted improperly both with regard to the granting of the non suit and the correction of the docket to read "Judgment on the Pleadings."

If the lower court acted improperly, then surely it acted improperly when it denied to the appellant his right to testify with respect to the oral contract on which he based his action. Only after he would have been given the opportunity to testify with respect to the oral contract, would the appellee be in position to testify as to any written contract.

The essential elements of "due process of law" are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case, and every man should have protection of his day in court and benefit of the general law, which hears before it condemns, proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under protection of the general rules which govern society. *Durkin v. Hey*, 33 N. E. 2nd 463, 376 Ill. 292.

The appellant contends that at the time of trial and before the written contract was introduced by the appellee, the lower court had no proof of the legality of the written contract and should have permitted appellant to testify and show the co-existence of an oral and written contract. The appellant was prepared to present evidence showing

that where colleges and universities grant to their teaching staff tenure or continuing employment, yearly contracts were executed between the parties. And, further, the appellent was prepared to testify and present evidence that it was the intention of the parties to have co-existent oral and written contracts.

Co-existent oral and written contracts have been recognized by the Courts of Pennsylvania. *Everson v. Fry*, 72 Pa. 329; *Hanauer v. National Surety Co.*, 279 Pa. 345; *Kaufhold v. Taylor*, 360 Pa. 372; *McCormick v. Harris*, 130 Pa. Super. 175.

The denial by the lower court of the right to testify before the jury, was an act of pre-judgment by the court, and a clear violation of the appellant's rights to due process of law guaranteed by the 14th amendment. The Supreme Court overlooked the opportunity to rectify this error and committed a further indiscretion relative to "due process of law" when it relied on the aforementioned statute and entered judgment for the appellee.

3. The Federal Questions Are Substantial

The term "due process of law" under the 14th Amendment of the Constitution of the United States has been pretty well defined.

In *Ownbey v. Morgan*, 41 S. Ct. 433, 256 U. S. 94, it was held that the due process clause of the 14th Amendment restrains state action, whether legislative, executive or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty and property is at stake in judicial proceedings.

In *Refoule v. Ellis*, 74 F. Supp. 336, 339 (D. C. Ga.), it was held that the words "due process of law" within the 14th amendment are intended to secure an individual from arbitrary exercise of powers of government unrestrained

by established principles of private rights and distributive justice.

In *United States ex rel. Marelia v. Burke*, 101 F. Supp. 615 (Pa.), it was held that due process of law requires essential fairness and justice in judicial proceedings. In determining whether essential fairness and justice is present we must give consideration to the entire judicial process including reviews and appeal.

Constitutional guarantee of due process of law assures to every litigant a fair and open hearing as a minimal requirement. *Railroad Commission of California v. Pacific Gas & Electric Co.*, 58 S. Ct. 334, 302 U. S. 388.

The above authorities indicate clearly that due process of law require essential fairness and justice in judicial proceedings. In its procedural aspects the constitutional guaranty of due process assures to every person his day in court, an opportunity to be heard, and the benefits of the general law.

It is contended that these constitutional guarantees were denied to the appellant in the instant case. He was denied the opportunity to be heard. His day in court consisted of identifying a contract which was introduced at an improper time in the trial proceedings. The action by the lower court was clearly arbitrary. The protection of the individual from arbitrary action is the very essence of due process of law. *Slochower v. Board of Education of the City of New York*, 76 S. Ct. 637, 350 U. S. 551.

The guaranty of due process of law is not limited in this case to the arbitrary action by the lower court. Such action initiated in the lower court was condoned in the appellate court when judgment was entered for the appellee, This constituted a denial of due process of law. In *Saunders v. Shaw*, 37 S. Ct. 638, 244 U. S. 317, it was held that where a case has been decided by the state supreme court in such a way that a party has not had a proper

opportunity to present his evidence, he has been denied due process.

It cannot be denied that the appellant had a contract of employment. If such contract was in effect as appellant contends, then any arbitrary and capricious action which resulted in the dismissal of the appellant without due process of law impairs the obligation of that contract.

Article 1, Section 10 of the Constitution of the United States provides that no state shall pass any bill in attainder, ex post facto law or law impairing the obligation of contract. Any enactment of a legislative character which attempts to take from a party a right to which he is entitled by the terms of a contract or which deprives him of the means of enforcing such a right is an impairment of the obligation of contract. The Supreme Court of Pennsylvania relied on the Statute of 1891, supra, in entering judgment for the appellee. It is contended that in the instant case this constituted an impairment of the obligation of contract.

The tremendous effect of this decision by the Supreme Court of Pennsylvania is to deny to the appellant, and all others who might have reason to appeal in similar cases, the constitutional right to their day in court.

It is, therefore, respectfully submitted that the appellant properly invokes the appellate jurisdiction of this Honorable Court.

Respectfully submitted,

ISADORE WINDERMAN,
Attorney for Appellant.

Appendix

IN THE

COURT OF COMMON PLEAS No. 2

(Tried in No. 4)

PHILADELPHIA COUNTY

June Term, 1953 No. 10945

JAMES F. KELEHER, *Appellant*

v.

LA SALLE COLLEGE

OPINION

John Morgan Davis, *J.* August 15, 1958.

This is an action in assumpsit instituted by plaintiff, James F. Keleher, against defendant, La Salle College, a non-profit corporation located in Philadelphia, Pennsylvania. Plaintiff was employed by defendant as an instructor in philosophy and religion from 1948 to 1953. Contracts of employment were entered into by the parties for each academic year.

Plaintiff complains that in June 1951, Brother G. Paul, F.S.C., a former President of La Salle College, orally increased plaintiff's salary and assigned him to be Acting Chairman of the Department of Philosophy and Religion; that he orally extended to plaintiff tenure of academic employment, or a lifetime teaching position not subject to faculty decreases; that plaintiff continued as an employee of the College under these terms of employment for the academic years 1951-52 and 1952-53. Plaintiff further complains that in March 1953, the new President of the College,

Brother E. Stanislaus, F.S.C., informed plaintiff that his services would terminate at the end of 1952-53 academic year for reasons other than plaintiff's failure to perform competently his teaching service, and that if academic tenure had ever been extended to the plaintiff by the former President it was revoked by the President then in office.

Plaintiff contends that the revocation of his academic tenure in 1953 was without cause and was a breach of the 1951 oral contract of employment for which he seeks damages.

Defendant's answer to plaintiff's amended complaint avers that the employment relationship with plaintiff was based solely upon separate one-year contracts. Defendant incorporated in its answer the written contracts for the 1951-52 and 1952-53 academic years. The answer specifically denies that Brother Paul extended to plaintiff tenure of academic employment and avers that all terms of employment were set forth in the written contracts executed each year. Defendant's answer further avers that the reasons for not renewing plaintiff's contract after 1953 are immaterial because the employment relationship ended in June 1953 upon the expiration of the written contract for that academic year. It is specifically denied that plaintiff and defendant ever entered into an oral contract in 1951 and averred that the relationship between them for the academic year 1951-52 was governed solely by the written contract executed on June 15, 1951. Defendant therefore denied plaintiff's loss and claim for damages.

At the trial defendant introduced in evidence the written contract of the parties, dated June 15, 1952, covering the academic year 1952-53. The contract provided that plaintiff was to be a full-time employee of defendant with the rank of Assistant Professor of philosophy and religion "for the College Academic Year 1952-53" for a basic salary of $4,160.00 "for the established college acadmic year, payable by La Salle College, semi-monthly, in accordance with the payroll procedure, on the 15th and 30th days of the

month, beginning with the 30th day of September and ending with the 15th day of June following." Defendant's counsel requested that plaintiff stipulate that the contract intoduced was the contract of employment between the parties for the academic year 1952-53. Plaintiff then identified his signature. Defendant moved for a nonsuit or directed verdict on the pleadings on the grounds that the pleadings did not allege fraud, accident or mistake, and parol evidence was not admissible to vary the contract. Defendant's motion was granted and plaintiff excepted thereto.

The court then allowed plaintiff to introduce in evidence four letters. The first letter, dated March 2, 1953, was addressed to plaintiff by Brother Stanislaus advising plaintiff that a new contract could not be offered him for the coming academic year due to the decrease in student enrollment and rising costs of operation of the college. The second letter, dated March 7, 1953, was plaintiff's reply to the first letter in which plaintiff advised Brother Stanislaus that he wished to appeal his case to the Board of Managers of the College, stating that academic tenure had been extended to him in June 1951 by Brother Paul. The third letter, dated March 11, 1953, was addressed to plaintiff by Brother Stanislaus advising plaintiff that if academic tenure had been extended to plaintiff by the former President of the College, then the new President could revoke same and further that plaintiff had never been considered by the Board of Managers of the College for academic tenure. It further advised plaintiff that he had no right of appeal to the Board and that he could continue as a member of the Philosophy Department until June 1954 at a reduced salary. The fourth letter, dated April 23, 1953, was addressed to plaintiff by Brother Stanislaus and stated that since plaintiff had not replied to the writer's offer to continue teaching at the college until June 1954, said offer was withdrawn.

The function of a motion for a nonsuit is to test a plaintiff's case after he has fully presented his evidence. Because plaintiff did not offer evidence to support his cause of action prior to the granting of defendant's motion, it is evident that the motion granted by the court was in the nature of a judgment on the pleadings. Defendant's answer incorporated the written contracts executed by the parties subsequent to the alleged oral extension of academic tenure to plaintiff by the former President of the College, Brother Paul. These are the contracts of June 15, 1951 and June 15, 1952.

A motion for judgment on the pleadings is in the nature of a demurrer to the pleadings. Therefore, all averments of fact properly pleaded in plaintiff's pleadings must be taken as true, or as admitted, unless their falsity is apparent from the record. *Cary v. Lower Merion School District*, 362 Pa. 210. As in the case of demurrer, judgment will not be entered upon a motion for judgment on the pleadings unless the right to judgment is clear and free from doubt and no material issues of fact exist. *M. H. Backford Co. v. Speigle*, 384 Pa. 227, 330; *Lehner v. Montgomery*, 180 Pa. Superior Ct. 493. Facts which would not be admissible under the parol evidence rule are likewise not admitted for purposes of ruling on a motion for judgment on the pleadings. *Architectural Title Company v. McSorley*, 311 Pa. 299, 300, 301.

It is true that, in absence of any allegation of fraud, accident or mistake, "the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence. *"O'Brien v. O'Brien*, 362 Pa. 66, 71; *Gianni v. R. Russell & Co.*, 281 Pa. 320. Only "where a contract is ambiguous, either party may produce evidence to resolve the ambiguity." *Security Trust Co. v. Stapp*, 332 Pa. 9, 13; *Albert v. Schenley Auto Sales, Inc.*, 375 Pa. 512, 515. Thus, the question of whether the averments in the pleadings of plaintiff would be admissible in evidence depends upon a determination as to whether an

ambiguity exists in the written contracts of the parties. The written contracts which were executed after the alleged oral contract between plaintiff and Brother Paul regarding the period of employment are clear and unambiguous. The contracts executed on June 15, 1951 and June 15, 1952 state the periods of employment to be the ensuing "College Academic Year" and the "established college academic year" and provide that salary payments thereunder shall be made between September 30 and June 15 of the academic year. The writing in this case being clear and unambiguous justifies a summary judgment for defendant. Nowhere in the subsequent written contracts is tenure of academic employment provided for. Hence plaintiff should not be permitted to recover on the theory of such tenure. He is bound by his written contract.

The period of employment being clear and free from doubt, the court determined that plaintiff's contention of an oral contract for a period of more than one year could not be proved without an allegation of fraud, accident or mistake, due to the applicability of the parol evidence rule to this case. In *Gianni v. R. Russell & Co.* supra, the court stated at page 323: "Where parties without any fraud or mistake have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement. . . . All preliminary negotiations, conversations, and verbal agreements are merged in and superseded by subsequent written contract . . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence." A principle of law established by the *Gianni* opinion is that when a writing and an oral agreement relate to a subject matter so closely related that they would logically be executed at the same time, in the same contract, then the writing controls as the expressed intentions of the parties. The test is whether the particular element of extrinsic negotiation is dealt with at all in the

writing. Clearly in this case the subsequent written contracts establish the periods of employment as terminated on June 15 of each academic year. Parol evidence to the contrary cannot be admitted. *Russell v. Barnes Foundation of the University of Pensylvania*, 143 F. 2nd 871; *Grubb v. Rockey*, 366 Pa. 592, 597.

Of course, there is a well recognized principle of law that a written contract may be supplemented by a subsequent oral contract. If in this case, the pleadings established the written contracts supplemented by a subsequent oral extension of tenure, plaintiff could not be barred from proving tenure. However, the alleged oral contract of June 1951 was never incoporated in the subsequent written contracts. Therefore, unfortunately for plaintiff, he is precluded from proving the alleged oral contract.

In *O'Brien v. O'Brien*, supra, it was held that the parol evidence rule is a rule of substantive law, not of evidence, and hence the right of a litigant to obtain judgment by reason of it may be determined by the pleadings. It is true that normally a motion for judgment on the pleadings will be entertained only after all pleadings are closed and the case has not yet been set for trial. Likewise, the motion will not be entertained if it is viewed as a delay tactic before trial. *Weygandt v. Bell Telephone Co.*, 65 D. & C. 177; *Weiscarger v. Wilkes-Barre Independent Co.*, 75 D. & C. 481. However, when a party is entitled to a judgment on the pleadings the court may enter such without regard to which party moved for judgment and the timeliness of the motion. *Boron v. Smith*, 380 Pa. 98; *Penn Wynne v. Lower Merion Township*, 181 Pa. Superior Ct. 524; *Stevick v. Cowan & Cowan, Inc.*, 3 D. & C. 2nd 363. A motion for judgment on the pleadings may be entertained even after the close of trial. *Steudler, Admx. v. Rust Engineering Company, et al.*, 77 D. & C. 598.

It became apparent to this court during its preparation for the trial of this case that the rule permitting the entry of a summary judgment was applicable under the

foregoing principles of law. The court therefore entered judgment upon defendant's motion in accordance with Rule 1034 of the Pennsylvania Rules of Civil Procedure.

ORDER

The Prothonotary will give notice to the parties or to their counsel of the filing of this Opinion and Order and further will correct the docket entry of November 7, 1957 showing that a nonsuit was entered and in its place enter "Judgment for defendant on the Pleadings" under the same date.

/s/ JOHN MORGAN DAVIS,
J.

FINAL JUDGMENT

April 1, 1958. Motion denied.

Eo die, Judgment entered for defendant.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 282 January Term, 1958

JAMES F. KELEHER, *Appellant*

v.

LA SALLE COLLEGE

OPINION

JONES, B. R., *J.* Filed: January 15, 1959

This appeal involves a question of the applicability of the parol evidence rule.

James F. Keleher, appellant, taught philosophy and religion at La Salle College, Philadelphia, from 1948 to 1953. On June 15, 1951, appellant and appellee, the latter acting through its then president, Brother Paul, entered into a written contract of employment, the summarized terms of which are: (1) appellant was employed as a full-time member of appellee's instructional staff with the rank of "Assistant Professor of Philosophy in the Area of Philosophy and Religion" for the academic year 1951-1952; (2) appellant agreed to (a) serve "faithfully, diligently and according to his best ability", (b) to accept at appellee's request certain administrative and non-teaching duties such as student consultation, etc., (c) by his conduct to uphold appellee's ideals and (d) not to engage, directly or indirectly, in any activity detrimental to appellee; (3) appellant was to be paid a salary—for a minimum semester teaching load of 12 semester credit hours and a maximum teaching load of 16 semester credit hours—of $3950, provided that

if the appellee requested a teaching load in excess of 16 semester credit hours per semester, appellant's compensation would be the sum, per hour, which the maximum semester teaching load multipled by thirty established academic weeks bears to $3950, multipled by fifteen established academic weeks for each semester.

On June 15, 1952, appellant and appellee, the latter again through its then President, Brother Paul, entered into another written contract identical with the 1951 contract in all respects except that it covered the academic year 1952-1953 and appellant's salary was fixed at $4160.

On March 2, 1953 Brother E. Stanislaus, then appellee's President, wrote appellant to the effect that appellee could not offer him a new contract upon the expiration of the 1952-1953 contract, assigning as the reason therefor the necessity that appellee curtail its expenditures because of rising costs and diminishing enrollment. On March 7, 1953 the appellant wrote Brother Stanislaus questioning his authority to revoke "academic tenure" which appellant stated had been given him in June 1951 by Brother Paul and requesting of Brother Stanislaus an appeal to appellee's Board of Managers. On March 11, 1953 Brother Stanislaus wrote appellant: ". . . Please be advised that, inasmuch as this [academic] tenure was extended to you by authority of the President, it can, likewise, be revoked under the same authority . . .", and since as President of the Board of Managers, Brother Stanislaus had full authority to act, no question of an appeal to the Board of Managers was involved. In the same letter Brother Stanislaus offered to continue appellant's services until June 1954 subject to the conditions that appellant would not act as head of the Department of Religion and Philosophy and that his salary would be cut to its previous level, which offer, in the absence of an acceptance by appellant, was withdrawn on April 23, 1953.

On September 18, 1953 appellant instituted an assumpsit action against appellee for an alleged breach of an

oral contract of employment. In this action appellant alleged that in June of 1951,* Brother Paul, appellee's President, entered into an *oral* contract with appellant increasing his salary to $4160, assigning him as "Acting Chairman of the Area of Philosophy and Religion" and giving him "tenure of academic employment", and that the revocation, without cause, of his tenure and employment by appellee violated and breached this oral contract. Appellee's answer denied the existence of any oral contract and averred that appellant's employment arose solely under the two written contracts of June 15, 1951 and June 15, 1952.

When the matter came for trial before Judge John Morgan Davis and a jury and after appellant's counsel's opening address, the first day of the trial apparently was consumed in conferences between the court and counsel. The next day, apparently as the result of a stipulation between counsel, appellee's counsel offered in evidence the written contract of June 15, 1952 and, in response to a question addressed to him by appellee's counsel, appellant acknowledge that the signature on this written contract was his signature. After appellant's counsel had placed in evidence the March and April 1953 correspondence between appellant and Brother Stanislaus, the trial court granted "a motion for a nonsuit on the pleadings". Appellant presented a motion to set aside this nonsuit which motion was subsequently denied and a judgment entered for appellee on April 1, 1958. Subsequent to the perfection of this appeal, Judge Davis in a written opinion directed the Prothonotary to correct the docket entries made April 1, 1958 which showed the entry of a nonsuit and to enter in place thereof judgment for the defendant upon the pleadings.

The instant record is far from satisfactory. *Apparently*, after conferences between counsel and the court, an agreement was reached as to the manner of presentation

* Whether the alleged oral contract was entered into prior or subsequent to the written contract of June 15, 1951, does not appear clearly from the record.

of the evidence so as to raise the fundamental issue in the lawsuit, to wit, the applicability of the parol evidence rule. The court then entered a "nonsuit on the pleadings" and the docket entries of April 1, 1958 reveal a denial of appellant's motion to set aside the nonsuit and the entry of a judgment for appellees. Then—*approximately four and one-half months later and after the present appeal had been taken*—the court directed the entry of a judgment on the pleadings under Rule 1034, Pa. R. C. P. Ordinarily this record should be remanded for appropriate correction. However, under the particular situation herein presented since the sole issue is whether proof of appellant's alleged oral contract is admissible in view of the written contract of June 15, 1952 and the record suffices to present that issue, we need not remand the record or determine the propriety as a mater of procedure of the action of the court below in entering either the initial nonsuit or the later judgment on the pleadings. Under the instant circumstances we have, under the Act of May 20, 1891, P. L. 101, §2, 12 PS §1164, the power to enter such judgment as we deem just and proper without remanding the record to the court below for amendment or correction. As the late Chief Justice Drew stated in *Jordan v. Sun Life Assurance Co. of Canada*, 366 Pa. 495, 500, 501, 77 A. 2d 631; "Plaintiff has also raised a procedural point. He was cross-examined extensively concerning the letter of resignation but the letter was not introduced in evidence at that time. At the close of plaintiff's case, defendant moved for a nonsuit but no action was taken on that motion. Defendant then opened his case by introducing the letter in evidence and renewed his motion for nonsuit, which was then granted. The granting of a nonsuit after defendant has introduced evidence is a clear violation of the Act of March 11, 1875, P. L. 6, §1 and cannot be condoned. However, to grant a new trial in this case where plaintiff is barred by the parol evidence rule from proving his claim would be a useless act and this Court will not make such a vain order. . . . Exercising

our power under that Act [the Act of 1891, supra] in the present case we shall here enter judgment for defendant." It would likewise be vain if we failed to exercise our power to act definitively in this action.

We repeat, the fundamental issue is whether, in view of the written undertaking of June 15, 1952 between the parties, the appellant should be permitted to prove by parol evidence the terms of the alleged oral contract of June 1951.

Walker v. Saricks, 360 Pa. 594, 598, 63 A. 2d 9, well states the Pennsylvania Parol Evidence Rule: "This Court said in Gianni v. R. Russell & Co., Inc., 281 Pa. 320, 323, 126 A. 791: 'Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement: Martin v. Berens, 67 Pa. 459, 463; Irvin v. Irvin, 142 Pa. 271, 287. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract . . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence: Union Storage Co. v. Speck, 194 Pa. 126, 133; Vito v. Birkel, 209 Pa. 206, 208.'" See also: *Grubb v. Rockey*, 366 Pa. 592, 79 A. 2d 255; *Bokser v. Lewis*, 383 Pa. 507, 119 A. 2d 67. In *O'Brien et al. v. O'Brien*, 362 Pa. 66, 71, 66 A. 2d 309, we said: ". . . the test is 'whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If they relate to the same subject-matter and are so inter-related that both would be executed at the same time, and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. This question must be determined by the court.'"

The written contract of June 15, 1952 is clear and free of any ambiguity. It purports to encompass all the terms and conditions of the relationship between appellant and appellee concerning the former's employment as a teacher

during the academic year 1952-1953. Appellant now seeks to prove an oral agreement which would clearly alter and vary the terms of this written contract in a most material instance, to wit, the length of appellant's employment. The written contract distinctly and unambiguously sets forth that appellant is employed for the academic year 1952-1953. What appellant wants to prove is that, as the result of an oral contract, he acquired "academic tenure" by which we understand permanent tenure. That appellant's oral contract would vary and alter the written contract is clear beyond any peradventure of doubt.

Appellant neither alleges nor does he seek to prove any fraud, accident or mistake, but simply contends that the Parol Evidence Rule is inapplicable because the written contract did not constitute an integration of the alleged oral contract and that both the oral and the written contract are co-existent. A comparison of the subject-matter of the written contract with that of the alleged oral contract clearly indicates an integration of the latter by the former. To allow appellant to prove an oral contract under these circumstances would violate the parol evidence rule, a rule to which this Court requires rigid adherence. Both the spirit and the letter of the parol evidence rule enunciated in *Gianni v. R. Russell & Co., Inc.*, 281 Pa. 320, 126 A. 791 and a host of subsequent decisions, compel the rejection of evidence as to any alleged oral contract in June 1951 between the parties.

For the reasons stated, judgment is directed to be entered for the appellee.

ORDER SUR PETITION FOR REARGUMENT

February 11, 1959

Petition Denied

PER CURIAM

ILE COPY

Office Supreme Court, U.S.
FILED
JUL 24 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 157.

JAMES F. KELEHER, *Appellant*,

vs.

LA SALLE COLLEGE, *Appellee*.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

MOTION TO DISMISS APPEAL.

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MOTION TO DISMISS APPEAL.

Appellee, pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal of JAMES F. KELEHER, Appellant, because (a) it does not present a substantial Federal question, and (b) the judgment rests on an adequate non-federal basis.

STATEMENT.

This is a direct appeal from a final judgment of the Supreme Court of Pennsylvania which directed judgment to be entered for Appellee, on appeal from the judgment of the Court of Common Pleas No. 4 of Philadelphia County which entered judgment on the pleadings.

Appellant invokes the jurisdiction of the Supreme Court of the United States under Title 28 U. S. C. Section 1257 (2). Since appellant contends that even though the Supreme Court of Pennsylvania under the Act of May 20, 1891, P. L. 101, Section 2, 12 P. S. Section 1164 (jurisdictional statement pages 4, 5, 19) had powers sufficiently broad to cover the case before them nevertheless that Court had no right to violate appellant's right of due process by denying a jury trial. Under the circumstances appellant should have filed a petition for writ of certiorari as authorized by 28 U. S. C. Section 1257 (3). It is assumed that this appeal will be considered as a petition for writ of certiorari as authorized by 28 U. S. C. Section 2103. In the event that the latter assumption is correct, then it follows that this Motion to Dismiss should be considered as a brief in opposition.

FACTS.

Appellant on September 18, 1953 instituted an action for civil damages arising out of contract, against LaSalle College alleging in his amended complaint that he taught philosophy and religion at appellee college from 1948 to 1953; that in June of 1951 the then president of appellee increased the former salary of appellant to $4,160.00 per year and assigned to him additional duties and gave him "tenure of academic employment"; pursuant to oral contract, that he continued his employment under these amended terms during the academic years of 1951-1952 and 1952-1953; that on March 2, 1953 the new president of appellee terminated appellant's employment; that on March 11, 1953 he was advised in writing that the academic tenure which had been granted to plaintiff by the former president was revoked by the new president and that he no longer enjoyed or had the benefit of academic tenure; that the revocation of academic tenure and termination of employment were a breach of the aforesaid 1951 oral contract of employment, whereby he suffered damages for which the action was instituted.

Appellee's answer filed May 3, 1954 denied the existence of an oral contract and averred that appellant's employment arose solely under two written contracts dated June 15, 1951 and June 15, 1952.

What happened at the trial scheduled for November 6, 1957 is accurately stated in the opinion of Justice B. R. Jones of the Pennsylvania Supreme Court (jurisdictional statement page 16). After lengthy conferences between Court and counsel, it became obvious that the written contract of June 15, 1952, and the alleged oral agreement of June 1951 covered the same subject matter and evidence to sustain the latter was not admissible. As a matter of formality by stipulation of counsel the June 15, 1952 written contract was received in evidence (R. 20a, 21a, 22a), whereupon the motion was granted which ended the litigation in the lower Court (R. 24a). Appellant's evidence

(Letter of March 2, 1953 R. 27a) indicated that the employer-employee relationship was on an academic year basis.

ARGUMENT.

THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS AND THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant attempts to convince your Honorable Court that he was deprived of his "day in court" when the trial judge prevented him from proving the alleged oral agreement entered into in June of 1951. Appellant contends that notwithstanding the Pennsylvania Parol Evidence Rule, the trial judge should have permitted the issue of the oral contract to go to the jury. Appellant further complains that the proceedings were inartistically conducted and challenges the right of the Pennsylvania Supreme Court to enter its own judgment under the Act of 1891, supra. The words "due process of law" do not necessarily imply a proceeding triable by a jury in every case where personal or property rights are involved. The constitution requires only that there be a hearing being a fair one held before a tribunal which at least meets currently prevailing standards of impartiality. *Wong Yang Sung vs. McGrath*, 339 U. S. 33, 50 (1950).

Neither by intention nor by result has the fourteenth amendment transformed the Supreme Court into a Court of general review to which questions of general justice or equitable consideration arising out of the taking of property may be brought for final determination, and as long as the local tribunal acts in consonance with the constitution, laws and procedure of its own state and as long as said constitution and laws are so interpreted as not to violate due proc-

ess, it is only in exceptional circumstances that the Supreme Court would feel justified in intervening. *Tracy vs. Ginzberg*, 205 U. S. 170 (1907); *Allen vs. Georgia*, 166 U. S. 138, 140 (1897); *Fallbrook Irrig. District vs. Bradley*, 164 U. S. 112, 157 (1896).

The Pennsylvania Supreme Court in the instant case, reported 394 Pa. 545, held at pages 551, 552, that the fundamental issue was whether in view of the written undertaking of June 15, 1952, between the parties, appellant should be permitted to prove by parol evidence the terms of the alleged oral agreement of June 1951 holding that said written contract is free and clear of any ambiguity further holding that:

> "what appellant wants to prove is that, as the result of an oral contract, he acquired academic tenure, by which we understand permanent tenure. That appellant's oral contract did vary and alter the written contract is clear beyond any peradventure of doubt—a comparison of the subject matter of the written contract with that of the alleged oral contract clearly indicates an integration of the latter by the former."

In the Lower Court the complaint filed, failed to aver the execution of the written contracts. If appellant had done so, the complaint would have been clearly demurrable and his case would not have proceeded to the point of even being listed for trial, in the absence of an averment that the subsequent written contract or contracts were entered into by fraud, accident or mistake. The answer to the complaint had attached to it copies of the written contracts and appellant had three and one half years to file an amended complaint attacking said writings if fraud, accident or mistake could have been averred.

Appellant argues (jurisdictional statement page 5) that only after he would have been given the opportunity to testify with respect to the oral contract could appellee be in position to testify as to any written contracts. Having already admitted that he executed the written contract with-

out averring fraud, accident or mistake, to permit him to have proceeded to prove an oral contract antedating, varying and contradicting the written contract would be useless and contrary to law whether of the United States, the State of Pennsylvania and of any other state. 22 C. J. 1248, Sec. 1663, and host of cases there cited. In the case of *Lewis Bokser and Sarah L. Bokser, Appellants vs. Morgan J. Lewis,* 119 Atlantic 2nd 67, 383 Pa. 507, certiorari denied 76 S. Ct. 1031, 351 U. S. 965, 100 L. Ed. 1485, it was held:

> "In Grubb v. Rockey, 366 Pa. on page 597, 79 A. 2d on page 258, supra, we said: 'The Modern Pennsylvania Parol Evidence Rule is well stated by Mr. Justice Stearne in Walker v. Saricks, 360 Pa. 594, 598, 63 A. 2d 9, 10: "This Court said in Gianni v. R. Russell & Co., Inc., 281 Pa. 320, 323, 126 A. 791, 792: 'Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement.' Martin v. Berens, 67 Pa. 459, 463; Irvin v. Irvin, 142 Pa. 271, 287, 21 A. 816. 'All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract * * * and "unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence".' " Union Storage Co. v. Speck, 194 Pa. 126, 133, 45 A. 48, 49, Vito v. Birkel, 209 Pa. 206, 208, 58 A. 127.' "

Appellant further argues (on the same page) that he should have been permitted to testify and show the **co-existence** of the alleged oral and written contract. His complaint averred nothing not already covered and mentioned in the written contract of June 15, 1952. When the oral and written agreements relate to the same subject matter and are so inter-related that both would be executed at the same time and in the same contract the scope of the oral agree-

ment must be taken to be covered by the writing. *Jordan vs. Sun Life Assur. Co. of Canada*, 1951, 77 Atlantic 2nd 631, 366 Pa. 495; *Gianni vs. R. Russell & Co., Inc.*, 1924, 126 Atlantic 791, 281 Pa. 320; *Colonial Manufacturing Co. vs. Carideo*, 1941, 16 Atlantic 2nd 731, 142 Pa. Superior 485. So that it is shown that there cannot be a co-existent oral contract to the written contract where it would be normal and natural to include the former in the latter.

Appellant (at the bottom of page 5 jurisdictional statement) states that appellant was prepared to present evidence showing that where colleges and universities grant to their teaching staff, tenure of continuing employment, yearly contracts were executed between the parties. It is most vehemently contended that had such an offer been made, it would be objectionable under the rules of evidence as being immaterial and irrelevant, the only issue being as to what happened in this particular case. The record is absolutely devoid of such an offer in evidence and counsel most sincerely decries the making of such an "off the record" argument.

If appellant has been deprived of any property, he cannot complain. It cannot be said that a Court denies due process when on an appropriate hearing it determines that there is evidence to sustain a finding, and a claim that a decision of such nature is erroneous, does not present a Federal question. *Bell Telephone Co. of Pennsylvania vs. Pennsylvania Public Utility Commission*, 1940, 60 S. Ct. 411, 309 U. S. 30, 84 L. Ed. 563. Substantially, appellant was accorded the full protection of the processes of the legal system in Pennsylvania by having his case reviewed first by the lower Court then the lower Court en banc and by appeal to the Court of last resort of Pennsylvania, namely, its Supreme Court. It is respectfully submitted that in determining whether the essential elements of due process were accorded or denied, substance rather than form is controlling, *Alpha Club of West Philadelphia vs. Pennsylvania Liquor Control Board*, 1949, 68 Atlantic 2nd 730, 363 Pa. 53; *Petition of Kariher*, 1925, 131 Atlantic 265, 284 Pa. 455. The

Supreme Court of Pennsylvania by directing judgment for the appellee merely corrected the record so as to reflect the proper result without in anywise creating a judgment contrary to the law.

The constitutional right to trial by jury restrains the lay jury to the limited and special role of determining controverted fact issues, and questions of law, methods of practice, and points of procedure are exclusively the province of the judge. *U. S. vs. Stone*, 59 S. Ct. 1044, 307 U. S. 620, 83 L. Ed. 441, motion granted 60 S. Ct. 1044.

There was no issue of fact for submission to a jury. This litigation is of no importance to anyone else but appellant. It has no bearing on similar undecided cases, public policy, the welfare of the nation nor involve a provocative challenge to our basic law.

It is submitted that the motion to dismiss, be granted.

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